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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 460

PHILLIP BENNETT — PETITIONER

vs:

STATE OF MISSISSIPPI — RESPONDENT

JURISDICTIONAL STATEMENT

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STATUTES:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1967 TERM

NO._____

PHILLIP BENNETT PETITIONER

vs:

STATE OF MISSISSIPPI RESPONDENT

JURISDICTIONAL STATEMENT

Petitioner prays for an appeal to review the judgment of the Supreme Court of the State of Mississippi, entered in this case on April 10, 1967.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Mississippi, together with the dissenting opinions of Justices Patterson and Smith attached hereto as Appendixes, is reported at _____ Miss. _____, 197 So. 2d 886.

JURISDICTION

The judgment of the Supreme Court of the State of Mississippi, was entered on April 10, 1967. The Mississippi Supreme Court entered a final order overruling a Suggestion of Error on May 8, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3), and 28 U.S.C. Sec. 2103.

An enlargement of time to docket this appeal was granted on June 23, 1967 by order of Judge W. N. Ethridge, Jr.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the charges against the petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the process clause of the Fourteenth Amendment?

2. Was the evidence legally sufficient to sustain the conviction?

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment Fourteen, Section 1:

> "No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On October 1, 1961, early in the morning, the body of Cecil Floyd, Jr., was found between the rails of the Illinois Central Railroad's main line about two or three miles south of Greenwood, in Leflore County, Mississippi. The railroad runs in a north-south direction and to the east of said railroad is highway 49-E, running parallel with the railroad and approximately two hundred yards east of the railroad. On the west side of the railroad right-of-way is a blacktop road with a ditch separating this road from the railroad. Approximately one thousand feet north of the point where the body was found is a crossing that leads from highway number 49 across the tracks to the

blacktop road and then into the Greenwood Airport. The body was between the tracks of the railroad at a point north of where a sidetrack entered into the main line of the railroad. On the west side of highway 49-E, and on the east of the railroad, there was a place operated by Scott Elliott and known as "Scotty's Place", which place was located, it was testified, approximately six hundred feet from where the body was lying between the rails of the railroad track.

It was testified, and is undisputed, that at the point where the body was found there was slag between the cross-ties (R. page 192) and when the Sheriff of Leflore County, John Ed Cothran, and Special Investigator Cole dug down into this slag they found blood (R. 193).

James R. Hankins, who was the undertaker and mortician for Williams & Lord Funeral Home at Greenwood, and who prepared the body for burial, testified that the body was mutilated; one of the legs was broken and one of the hands was cut off, and that there were bruises, cuts and contusions about the face (R. 89). The bruises about the face, or head, were a lacerated place on the left temple and bruises about the head over the right eye (R. 89). He stated that although only a small amount of blood was drawn from the body during the embalming; that his hand had been mutilated and some fingers were missing, causing Floyd to bleed severely and his leg had been broken in two places and his femoral artery was punctured (R. 90).

Dr. Daniel Trigg, a physician, and the pathologist for the Greenwood Leflore Hospital, testified that he performed an autopsy on the body of Cecil Floyd, Jr. the next day after the

body was found (R. 92). His findings were that a cerebral concussion was the immediate cause of death (R. 93). He was unable to state from his examination what instrument, or what type of instrument, caused the wounds that he found on the deceased's body, stating that he could say only that it was a great force, or a large mass that struck him. (R. 94). He stated that this could have been a large object with one blow or a smaller object with repeated blows. The death certificate, completed by Dr. Trigg, was introduced into evidence and appears in the Record at page 100, and this death certificate stated that the cause of death was a cerebral concussion, multiple fractures of the skull and other sites", and that the time from onset of injury to death was from one to five minutes and the death was an accident, and that "autopsy findings indicative of deceased being struck by a passing train while walking on tracks" (R. 100). Dr. Trigg states that he reached the conclusions that he placed upon the death certificate from a history given to him by the Sheriff and others, and from certain objective findings, among which was the fact that there was no swelling on account of any prior bruises and no indication of any previous injuries (R. 98). He repeated that the cause of death was cerebral concussion set off by fracture of the skull, and the skull fracture was caused by a tremendous blow (R. 101).

The remainder of the testimony offered by the state was that of three witnesses; they being Marjorie Stevens, Willie Mae Lott and Charles Wiggins.

The testimony of Marjorie Stevens appears in the Record at pages 104 to 120. In brief, her testimony was to the effect that on the night of September 30, 1961 she went to Scotty's

Place around eleven o'clock P. M. to get something to eat and after arriving at the place she went inside and ordered a ham sandwich. While she was eating her sandwich she talked to Cecil Floyd, Jr., who was in the restaurant when she went in and who sat on the stool next to her. After some conversation with Mrs. Stevens, she stated that Floyd attempted to use a telephone. She would not say he was drunk, but stated something appeared to be the matter with him. He walked behind the counter to use the phone there and was advised by Elliott, the owner and operator of the restaurant, that he could not use that phone and then Floyd walked from behind the counter, bumped into Phillip Bennett, appellant here, who she stated then hit Floyd, causing him to fall back into Scott Elliott and Otis Nester, who were standing there. She stated that then Nester, Elliott and Bennett took Floyd outside but she did not go outside and continued to eat her sandwich. Sometime later around an hour later, she left and when she got outside the building she stated she saw a fight and she could see Bennett, Nester and Elliott apparently standing over someone, whom she could not identify, with Elliott holding a gun and with Nester and Bennett striking the party, or parties, on the ground.

Mrs. Sevens admitted that she had been questioned by W. W. Smith, a Deputy Sheriff of Leflore County, Mississippi, several days after the death of Floyd and that she had lied to the Deputy Sheriff. She stated she had given him a written statement that was partly untrue. She stated that she had told Mr. Smith, the Deputy Sheriff, that when she went outside the building to go home she saw Cecil Floyd, Jr. The statement she refers to is in the Record at Page 235-A. It will be observed

that in this statement, Mrs. Stevens said nothing about seeing Nester, Elliott or Bennett fighting, or that she saw a gun in Elliott's hands. She stated that she gave the statement to Smith because she had received some telephone calls threatening her, (R. 124), and although she had testified in the Nester trial and in the Elliott trial, at the Bennett trial it was the first time that she admitted that she told Mr. Smith, the Deputy Sheriff, a lie. She stated that the reason she was now stating and telling the truth was that she could not live with her conscience because she had four boys (R. 127).

The second witness in reference to the occurrence that night was Willie Mae Lott, the cook at Elliott's place. She said she saw Mr. Floyd in the cafe, and while he was trying to make a phone call, the appellant, Bennett, knocked the receiver out of his hands, then hit Floyd up side the head (R. 130). After the lick was passed, she said that Elliott, Mr. Otis (Nester), and Bennett went out of the door pushing Floyd and a crowd went out behind them. She then heard some cursing around on the outside and when she went out ten or fifteen minutes later no one was out there (R. 132). She stated that when Floyd was pushed out of the door a crowd consisting of a great big bunch of people also went out of the door. She fixed the time of the occurrence at around twelve o'clock and stated that it was a little after twelve when she left (R. 132) and at that time there was nobody on the outside of the building at all and that very few people were then inside the building. She did not know the names of any persons who were in the building, or any persons who were at the scene that night except Floyd, Mrs. Stevens, and the three persons Elliott, Nester and Bennett, who were indicted, although she admitted there were many

more there. (R. 146).

The last witness for the state was Charles Wiggins, whose testimony appears in the Record beginning at Page 147 and ending at Page 175. Wiggins testified that he went out to Elliott's Place about midnight. He went into the cafe and got a bottle of beer, the beer being served to him by Nester (R. 160), and he placed the time as being between 12:00 and 12:30 o'clock A. M. He stated he got the beer, came back and got in his car and was getting ready to leave and go home but found that he could not leave because a car had driven up behind him, blocking his car. He stated he had parked in front of the building close to the south side of the building. While he was in the cafe, the only person he recognized was Mrs. Stevens, a witness for the state in this case, and Nester. When he came out of the cafe, he saw Cecil Floyd, Jr. standing propped up against the wall near the south side, being right at the corner (R. 162). No one was with Floyd. Suddenly, according to Wiggins, Elliott and Bennett came out of the cafe, Bennett grabbed Floyd and shoved him down and Elliott began to beat Floyd with the butt of a gun (R. 165). He stated that Elliott began to hit Floyd with the butt end of the gun about the head, hitting him hard. The witness testified that he was not able to see well enough and so he turned on his car lights so that he could see better. His lights were in good condition. He stated he had a ring-side seat (R. 167). Although he could see very well, he stated that he saw no blood whatsoever. The witness then stated that Bennett picked Floyd up by his legs and Elliott by his arms and they carried Floyd to a car, coming by the car where the witness Wiggins was sitting. He said as they came by telling Floyd that Elliott said if he said anything he would be next. The witness

then stated that although other people had come out and got in their cars to go home that he was able to get directly behind the car in which Bennett and Elliott had placed Floyd (R. 170) and he followed them but turned his lights out because he didn't want them to see him (R. 171). When the car in which Floyd was then riding reached the crossing, the car turned to the left, crossed the railroad and then turned back to the left, going south down the blacktop road. The witness admitted that he had not said this on another trial in which he had testified, but had merely stated then that when he got to the railroad crossing the car turned to the left toward the airbase and he went on home (R. 173).

The witness testified that these events occurred on the night of September 30, 1961, but that he had not told anyone what he had seen, nor had he mentioned it to anyone until approximately a month before Elliott's trial in May of 1965. At that time, he stated he told what he had seen, or purportedly saw, to Mr. Floyd, the father of the deceased, and the reason for his so telling was that he wanted to "get it off my conscience" (R. 175).

The witness stated that he knew the next day that Cecil Floyd, Jr. was dead, having read it in the paper that he had been killed (R.178). He was positive that he had not seen Otis Nester out in front of the cafe, but he admitted to being a friend of Nester's and that they had been boys together and he had known him all his life (R. 176).

Witnesses for the defendant were Owin Cole, John Ed Cothran, Harold Lee Carlisle, Merle Francis, Leon Polevado, R. D. Slicker and W. W. Smith. The appellant, Phillip Bennett, also

testified in his own behalf.

Gwin Cole, who is a special investigator for the State of Mississippi, and whose duties are to assist local police officers in the investigation of any crime committed against the State of Mississippi, testified that he came to Greenwood at the invitation of Sheriff John Ed Cothran and made an investigation into the death of Cecil Floyd, Jr. His testimony was to the effect that he had gone to the scene where the body was found with the Sheriff and there dug down into the slag on the railroad tracks and found blood; that he had interviewed Dr. Trigg to find out what was the cause of the death of Floyd and had been told that all the bruises and cuts that were on the body were done with one instant impact, there being no cuts or bruises on the body or any swelling that would indicate that he had been hurt before the impact (R. 180); that he had interviewed some witnesses and taken statements, and the statement of Majorie Alderman, who testified in the case as Marjorie Stevens, and given to him by W. W. Smith, a Deputy Sheriff, and he had made a photostatic copy of it. This photostatic copy was introduced for identification (R. 182). The statement is the same one that was introduced in evidence and appears in the Record at page 235-A. Mr. Cole also testified that there is a drive, or turn-off, from 49-E going west to the railroad, and that he walked this path from the highway to the railroad, it being accessible (R. 186), although there was a fence which he climbed over. The turn-off was approximately 150 yards north of Elliott's place.

John Ed Cothran, who was Sheriff of Leflore County in 1961, corroborated the testimony of Gwin Cole. He stated that he had

gone to the scene where Floyd's body was on the morning of October 1, 1961, and then had his Deputy W. W. Smith, make an investigation. Coleman, himself, began to investigate the death of Cecil Floyd, Jr. about a week later. He stated that he had requested Gwin Cole to come to Greenwood to assist in the investigation and corroborated Cole in his statement that they dug down into the slag at the scene and found blood; and he stated that they had gone to Elliott's cafe and made an investigation and found no blood or weapons of any kind there, found the path leading from the highway to the railroad approximately 50 yards north of Elliott's cafe, walked the path, climbed the fence and came out on the railroad track even, or about even, with where the body was found; he stated that he talked to Dr. Trigg, who had given him his opinion that Floyd was standing up when the train hit him and that he died instantly and his reason for saying that was because there was no swelling at all; he stated that he had talked to Phillip Bennett, the appellant, Marie Branch, a witness for the defendant, Harold Carlisle, a witness for the defendant, and that at the scene where the body was found a shoe belonging to Floyd was also found; and that this shoe was sitting up under the train full of water and still laced up (R. 198). That he made an investigation with reference to the trains that might have passed over the track that night and found that one train went up the line a little after two o'clock and the other train was the train that was setting over the body when he got out to the scene (R. 199).

Marie Branch, an employee of Southern Bell Telephone Company, in Greenwood, for nineteen years, testified that on the night of September 30, 1961, she was going to her home in Tidwell Addition and went to Betty's Place about twelve

o'clock that evening; that she was alone; that she sat down in a booth and Phillip Bennett, who she knew, and whose wife worked with her at the Telephone Company, was sitting on a stool; that at the time Cecil Floyd, Jr., whom she did not then know, was sitting next to some lady drinking beer; that Harold Carlisle and Polewoda were also there. She stated that Floyd tried to use the telephone and after trying to do so he came back and stumbled and fell over Phillip Bennett, and that Phillip Bennett slapped him (R. 203); that Elliott came around from behind the counter, said something to Floyd and got him to go on the door; she stated that the Floyd boy was drinking; she heard no threats made by Bennett to Floyd; that she, Phillip Bennett, Harold Carlisle, Leon Polewoda and some others stayed in the cafe approximately twenty or thirty minutes after Cecil Floyd had left. Then she, Bennett, Polewoda and Carlisle decided that they would go down to Lusk's cafe which was located south from Scotty's Place on Highway 49-E because Scott was closing up and that she and Phillip Bennett drove down to Lusk's Place in her car; that when they got to Lusk's cafe it was closed and she and the others turned around, she drove back up Highway 49-E, passed Elliott's place, drove up to the by-pass, turned around, came back to Elliott's Place where she let Bennett out of her automobile; that Bennett then got in his car, drove off towards Greenwood and she went on home to Sidon. She stated that it was approximately two o'clock A. M. at the time Bennett got out of her car and headed towards Greenwood.

Miss Branch's testimony was coroborated by Harold Carlisle who stated that on the night of September 30, 1961 he went to Elliott's cafe with Leon Polewoda. He stated that when he and

Polewoda went into the cafe they saw Bennett and they stopped and talked to him. While they were standing there, Cecil Floyd, Jr. walked in, started over to a telephone booth, tried to make a telephone call, came back, stumbled into him and then stumbled into Phillip Bennett, then Floyd grabbed Phillip by his tie and started choking him; that Bennett asked him to let him go and Phillip slapped Floyd; that Elliott then walked to the end of the counter and told Floyd that he had to go and Floyd walked out of the front door; he stated that Floyd was drunk; that no one went out of the door with him. He stated that he stayed at the cafe and finally he, Polewoda, Marie Branch and Phillip Bennett decided they would go to Lusk's cafe and that he went to the cafe with Polewoda while Marie Branch and Phillip Bennett went in another car; that when they got to the cafe it was closed and he told Bennett that he and Polewoda would meet him at the Standard Cafe just at the edge of Greenwood; that he and Polewoda went to the cafe and Bennett came in and they all stayed in the Standard Cafe until after daylight on the morning of October 1, 1961. He stated that Bennett had called him the next morning and asked him if he heard about the Floyd boy being hit by a train.

Leon Polewoda also testified for the defense. He stated that he went to Scott Elliott's Place on the night of September 30, 1961, with Harold Carlisle. They arrived at the place between 12:30 and 1:00 o'clock (R. 220). He knew Phillip Bennett and saw him when he came into the cafe. He also knew Marie Branch and saw her there. He stated that after he went into the cafe Cecil Floyd, Jr. came in, stated he wanted to use the telephone, went to use the phone and staggered into Bennett, grabbed Bennett by the shirt at which time Bennett slapped or

hit him; he said he heard no threats made by Phillip Bennett to Cecil Floyd, Jr. and that Floyd was drunk at the time; that after he was slapped by Bennett, Elliott came around from behind the counter, told Floyd he would have to leave and that Floyd went out the door and left (R. 223), and that no one went out of the door with Floyd. He stated that he, Harold Carlisle, Phillip Bennett and Miss Branch left sometime later going to Mrs. Lusk's place; that he didn't see Cecil Floyd, Jr. on the outside and never saw him again, after he went out of the front door. Mrs. Lusk's place was closed and he and Harold Carlisle went to the Shell Cafe and Phillip Bennett came in and joined them (R. 224); that he reached the Shell Cafe approximately 1:30 A. M. and stayed until daylight. He admitted that he was a good friend of Phillip Bennett's (R. 227).

Robert Stigler also testified for the defense and his testimony is in the Record on Pages 228-230. He stated he lived in Sidon, Mississippi and that on the night of September 30, 1961, or the early morning of October 1, 1961, he was driving home, having been in Greenwood, at about 1:00 or 1:30; that as he drove south on Highway 49-E and got to Scott Elliott's Place maybe 100 yards north he noticed someone wobbling pretty bad, and walking up the highway; that he slowed down and then drove on and that the person he saw walking towards Greenwood going north was Cecil Floyd, Jr.; that he did not see Cecil Floyd, Jr. any more after that (R. 229). He stated, on cross-examination, that he knew Miss Marie Branch and had known her practically all of his life and that she was a good friend of his (R. 230).

Wilbur W. Smith, who was the Chief Criminal Deputy

Sheriff of the Sheriff's Department in 1961, testified that he made an investigation into the death of Cecil Floyd, Jr., (R. 232); that he as a part of that investigation took a statement from a Mrs. Marjorie Alderman (now Mrs. Marjorie Stevens); that she signed the statement that he took; he identified the statement introduced in the evidence by Gwin Cole's testimony as a copy of the original that he wrote in long hand and which Marjorie Alderman signed; and which he witnessed; this statement was introduced in the evidence and now appears in the Record at Page 235-A; the statement was given to him on October 6th, five days after the body was found.

The appellant, Phillip Bennett, testified that he was born in Greenwood, went to school in Greenwood, and now lived in Greenwood (R. 240); that he is married, has no children, and has been employed almost twelve years by Western Electric Company. He stated that on the night of September 30, 1961 he went to Elliott's place about 10:30 or 11:00 o'clock by himself. He stated that he did not remember ever seeing Cecil Floyd, Jr. before that night but recalled that he was there when he went into the cafe although he paid no attention to him, he talking to Leon Polewoda, Harold Carlisle and Marie Braneh; that sometime later Cecil Floyd, Jr. stumbled into him and Bennett pushed him back and said something to him about like "what's wrong with you"; that Floyd then grabbed his clothes and Bennett slapped him (R. 244); that he did not threaten him, or tell him that he was going to kill him; that thereafter Elliott came around and told Floyd he had to go and somebody opened the door and Cecil Floyd went out the door; that the said Floyd was not bruised, injured or knocked down by his slap (R. 244). That after Floyd had left, he stayed in the cafe talking to

Harold Carlisle, Marie Branch and Leon Polewoda, and that then they left together, and he got in Marie Branch's car and drove down the highway, about a couple of miles to Mrs. Lusk's cafe (R. 246); that Harold Carlisle and Leon Polewoda went down to Lusk's cafe that night in their car; that when they got to Lusk's it was closed and he agreed to meet Polewoda and Carlisle at the Standard Cafe; Marie Branch drove him back to his car which was at Elliott's place and he there got into his car and came on to the Standard Cafe where he went in, joined Leon Polewoda and Harold Carlisle and stayed until daylight (R. 248); thereafter he went home and went to bed and the next morning he heard from his wife that the Floyd boy had been killed (R. 249); that he called Carlisle to find out the name of the boy he had the scuffle with the night before (R. 250) and then called the Sheriff of Leflore County and told them of the incident at the cafe. He stated that he had given a statement to W. W. Smith; he stated that he did not kill Cecil Floyd, Jr.; that he did not cut or bruise him; that he did not threaten to kill him. (R. 251).

ARGUMENT

It is submitted that the decision below affirms a criminal conviction based upon no evidence of guilt, and, therefore deprives petitioner of due process of law.

The Supreme Court of the United States, in the Case of Thompson vs Louisville, (1960), 362 U. S. 199, 4 L. Ed 2d 654, 80 S. Ct. 624, 80 A.L.R. 2d 1355, declared that the ultimate question, in that case presented, was whether the charges, against the defendant there, were "so totally devoid of evidentiary support as to render the conviction unconstitutional under the due process clause of the Fourteenth Amendment" and, in that case announced, that finding no evidence whatever in the record to support the conviction, the court then held that to convict and punish a man without evidence of his guilt is a violation of the due process guaranteed by the Fourteenth Amendment to the Constitution.

The ruling of the court in that case has been followed in the case of Garner v. Louisiana, (1961), 368 U. S. 157, 7. L. Ed. 2d 207, 82 S. Ct. 248, and in the case of Taylor vs Louisiana, (1962), 370 U. S. 154, 8 L. Ed. 395, 82 S. Ct. 1138, R.E.H. Den. 370 U.S. 965, 8 L. Ed. 2d 834, 82 S. Ct. 1578; and we submit, that in the case of Brown vs Louisiana, (1966), 383 U. S. 131, 15 L. Ed. 2d 637, 86 S. Ct. 719, this court extended the holdings set forth in the Thompson and Garner cases, supra, and held that a conviction in which there is a lack of evidence on only one of the constituent elements of a crime comes within the rule of Thompson, supra, and violates the due process protection guaranteed by the Federal Constitution.

The rule that where there is lack of evidence of one of the constituent elements of a crime, and therefore a denial of due process is now universally followed by the United States Courts.

It was held in the case of United States ex rel De Moss vs Penn (1963, CA3 PA) 316 F. 2d 841, Cert. Den. 375 US 859, 11 L. Ed. 2d 85, 84 S. Ct. 123 that:

> "The sole question before us is whether this appeal is within the rule of Thompson vs Louisville, 362 U. S. 199 and Garner vs Louisiana, 368 U. S. 157.
>
> The court held in those opinions that it is a denial of due process for a state to convict someone upon no evidence of guilt. The court was careful to point out that 'decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all'. Thompson vs Louisiana, supra, at page 199, 80 S. Ct. at 625. Thus, the pivotal point of our inquiry is whether the conviction of De Moss rests upon 'any evidence' which would support the finding that he committed the crime charged; Garner vs Louisiana, Supra at 163-164, 82 S. Ct. at 251-52."

United States ex rel De Moss
Vs. Penn (1963, CA3 PA)
361 F. 2d 841,
Cert. den. 375 U. S. 859,
11 L. Ed. 2d 85,
84 S. Ct. 123.

In the case of United States ex rel Mallory vs Myers, (1964,

D.C.P.A.), 240 F. Supp. 373, Affd. (C.A.3) 343 F. 2d 912, Cert. Den. 381 U. S. 943, 14 L. Ed. 2d 706, 85 S. Ct. 1781, the petitioner there instituted a habeas corpus proceeding contending that there was no evidence to show any intent to commit a felony at the time of his entry into the building involved, and the court found as follows:

> "Test of due process was whether there was any evidence, no matter what the quantum, that person intended to commit a felony—at time of entry into the building involved."

U. S. ex rel Andrew Mallory
vs. Myers, 240 F. Supp. 373,
343 F. (2d) 912.

In petitioner's case here, the State, in order to convict, was required to prove the corpus delicti. It is basic law that the corpus delicti in a homicide case is made up of two fundamental facts, the first being the fact of the death of the deceased, and the second, the fact of the existence of a criminal agency as to the cause of the death. It is not contended here that the first element, or the fact of the death of the deceased, was not proved and evidence offered in support thereof; but it is our contention that there was no evidence offered to prove the second element; that is, the fact of the existence of a criminal agency as to the cause of death, and there being no evidence, as to this element, petitioner's case falls within the rule set forth by this court in Thompson, supra.

The State, in petitioner's case, attempted to show a criminal agency through circumstantial evidence; circumstantial evi-

dence is, of course, admissible to prove facts; but the Mississippi Supreme Court has held that where circumstantial evidence is relied upon it must do more than create a suspicion of guilt, and the circumstances proven must, not only be true in fact, but must be such as to exclude every reasonable theory that the defendant is innocent.

> "It is the exclusion of every other reasonable hypothesis than that of the guilt of the accused, that invests the circumstances with the force of proof."
>
> Pitt vs State,
> 43 Miss. 472 (1870)

The rule as stated in Corpus Juris Secundum is:

> "To establish death by criminal cause, however, presumptive evidence must be most cogent and irrestible. The circumstantial evidence must be such as to permit the jury to draw a reasonable inference that a crime has been committed, and circumstantial evidence is insufficient to establish the criminal agency if it is as consistent with the absence as with the existence of the criminal agency."
>
> 41 C.J.S. Homicide,
> Sect. 312, P. 18.

We submit to the court that, in effect, these cases hold that unless every other reasonable hypothesis than that of the guilt of the accused is shown by the attempted evidence, and, if such proof is as consistent with the absence, as with the existence of a criminal agency, then there is no evidence at all, and a conviction, where such preferred proof does not meet this test,

is based on no proof at all; and this is true because, under the rules of practice and procedure, a motion for a directed verdict is proper and should be sustained.

The federal courts follow a similar ruling in reference to circumstantial evidence.

> "Where the prosecution depends entirely on circumstantial evidence for a conviction, it must not only be consistent with the guilt of the defendant, but it must be inconsistent with his innocence."

U. S. vs Green
146 F. 803, Cert. Den. 28 S. Ct. 261, 207 U. S. 596, 52 L. Ed. 357

> "Circumstantial evidence which is as consistent with the absence of a crime as with the perpetration of the crime, is insufficient to prove the corpus delicti."

Goff vs U. S.
257 Fed. 294

It might be contended that this rule goes to the sufficiency of the evidence, but, as stated, in the case of Kyle vs Swift and Company:

> "Rule that circumstantial evidence must be of such character as to exclude every reasonable explanation but that of liability which plaintiff seeks to charge against defendant is rule to be applied in criminal case where guilt must be established beyond reasonable doubt, and is

not the rule to be applied in determining sufficiency of evidence to take case to jury."

Kyle vs Swift and Company
229 F. 2d 887

The Supreme Court of Mississippi, long ago, in the case of Algheri vs. State, 25 Mississippi 584, 589 (1853) stated that circumstantial evidence is a species of evidence in the application of which the utmost caution and vigilance should be exercised:

"A distinguished writer of the law of evidence has said, that 'it is always insufficient, where assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true, for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of truth. Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however, great the probability may be.' 1 Stark. on Ev. 572. . . the circumstances proved in this record against the accused, did not warrant his conviction . . .

(underscoring ours)
Algheri vs. State
25 Miss. 584, 589 (1858)

Did the circumstantial evidence offered by the State do more than create a suspicion of guilt and did it exclude every reason-

able theory that the defendant is innocent? Did it exclude every other reasonable hypothesis than that of the guilt of the accused? We submit that it did not, and such evidence cannot amount to proof, however great the probability may be, and there being no proof petitioner was convicted without due process of law.

The body of the deceased was mutilated (R. 89); one of the legs was broken, one of the hands was cut off, the femural artery was punctured and there were bruises, cuts, and contusions about the face, (R. 89-90). The death certificate, signed by Dr. Daniel Trigg, a physician, and the Pathologist for the Greenwood-Leflore Hospital, shows the cause of death as a "cerebral concussion-multiple fractures of the skull and other sites", (R. 100); the time from onset of injury to death from one to five minutes; and that death was an accident (R. 100). Dr. Trigg, his conclusions being that the death of the deceased was an accident, caused by him being struck by a passing train, stated he reached this conclusion because of the history given to him by the Sheriff, and from objective findings, among which was the fact that there was no swelling on account of any prior bruises and no indication of any previous injuries (R. 98). This testimony was corroborated by Gwin Cole, (R. 180), and Sheriff John Ed Cothran (R. 197).

We submit this testimony alone is sufficient to show an absence of any criminal agency on the part of petitioner herein causing the death of the deceased.

The State contends that the testimony of Charles Wiggins, is such as to exclude every other reasonable hypothesis than that of the guilt of the petitioner, and is such to invest the

circumstances testified to with the force of proof. We submit that Wiggins testimony is so unbelievable , so contradictory, so untrustworthy and so unreasonable that it has no value. Wiggins testified that although he saw the deceased brutally beat and struck many times with the butt end of a gun, there was no blood inflicted by the wounds on the deceased. This testimony is contradicted by that of Dr. Trigg, who testified that there was no swelling on the body because of any prior injuries, or any indication of any previous injury to the deceased, prior to the time he was struck by the train; and while, of course, it is possible that Wiggins, whose sole reason for withholding his testimony for a period of over three years was that he was afraid of what might happen to him, and because he had been warned of dire treatment if he revealed anything of what he had seen, would have followed the car in which the deceased had been placed, as he testified he did, with his lights out up a public highway for approximately a mile and a half to two miles, and subject himself to being seen by those occupying the car he was following, we submit that, because of the type person he apparently is, and as recorded by his testimony, that he probably would not have done so; and certainly this testimony does not rise so high that it excludes every other reasonable hypothesis than that of the guilt of the petitioner and invests the circumstances with the force of proof.

There is uncontradicted proof, in this case, from the witness R. D. Stigler, that he saw the deceased walking up the highway about 1:30 A. M. and after the time of the beating as described by the witness Wiggins, R. 228-230) and at a place on the highway approximately one hundred to one hundred and fifty yards north of the scene where Wiggins testified he had seen

the beating, and at the approximate point, where it was testified, by Cole and Cothran, that there is a path, or roadway, leading from Highway 49 East, to the tracks of the Illinois Central Railroad. (R. 186). We submit this evidence, standing alone, is such that the inference, deductible from the facts so proven, does not exclude beyond a reasonable doubt every other hypothesis than that of guilt.

Other testimony in this case of the State, particularly that of Marjorie Alderman, now Marjorie W. Stevens, is contradictory of the testimony offered by the State through the witness Wiggins, (R. 104-129) as is that of the other witness for the State, Willie Mae Lott, the cook, (R. 180). The evidence of these two witnesses, either considered separately or as a whole, with the testimony of the other witnesses for the State, adds nothing that excludes beyond a reasonable doubt every other hypothesis than that of the guilt of the petitioner herein.

At the conclusion of the State's case a motion for a directed verdict was made by petitioner (R. 176). This motion followed the proper criminal procedure in Mississippi courts to bring before the court the question as to whether or not there was any evidence to convict the petitioner herein with the crime and this motion was overruled. The motion was not based on any sufficiency of the evidence but on whether or not there was "any evidence" connecting petitioner with the crime and particularly the fact of the existence of any criminal evidence as to the cause of the death. We submit that the attempted evidence offered by the State was not such that amounted to proof if the rule in reference to criminal evidence as set out in the above cases is followed, and there being no proof petitioner's

rights under Article Fourteen of the Constitution was violated and he was convicted without due process of law.

CONCLUSION

For the reasons stated above, the petition should be granted to consider the questions raised herein.

Respectfully submitted,

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CERTIFICATE

I, Hardy Lott, a member of the firm of Lott, Sanders & Gwin, and Attorney for Phillip Bennett, the petitioner herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of August, 1967, I served three copies of the foregoing Jurisdictional Statement on Honorable Joe T. Patterson, the Attorney General for the State of Mississippi, New Capitol Building, Jackson, Mississippi, by mail in a duly addressed envelope with postage prepaid.

Hardy Lott
ATTORNEY FOR PHILLIP BENNETT